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JOHN T. FEY

Supreme Court of the United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON MERITS FOR PETITIONER

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OPINIONS BELOW

The District Court filed no opinion. The opinion of the Court of Appeals (R. 71) is reported in 238 F. (2d) 346.

JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1956 (R. 71). The Petition for Rehearing was denied on November 15, 1956 (R. 82). The Petition for a Writ of Certiorari was filed on December 19, 1956, and was granted on February 25, 1957 (R. 83). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law".

28 U. S. C. 2106.

"The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Title 72: Workmen's Compensation, Code of Laws of South Carolina, 1952.

"Sec. 72-111. **Liability of owner to workmen of Subcontractor.**

When any person * * * referred to as 'owner' undertakes to perform or execute any work **which is part of his trade, business or occupation** and contracts with any other person (* * * referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had immediately been employed by him". (Emphasis added.)

"Sec. 72-121. **Employee's rights under Title exclude all others against employer.**

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee * * * as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

"Sec. 72-101. **When acceptance of provisions presumed.**

Every employer and employee * * * shall be presumed to have accepted the provisions of this Title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of his employment and shall be bound thereby * * *."

"Sec. 72-501. **Records and reports of injuries.**

Every employer shall keep a record of all injuries, fatal or otherwise, received by any of his employees in the course of their employment on blanks approved by the Commission. Within ten days after the occurrence and knowledge thereof, as provided in Section 72-301, of an injury to an employee, causing his absence from work for more than seven days, a report thereof shall be made in writing and mailed to the Commission on blanks to be procured from the Commission for this purpose.

"Such report shall contain the name, nature and location of the business of the employer and the name, age, sex, wages and occupation of the injured employee and shall state the date and hour of the accident causing injury, the nature and cause of the injury and such other information as may be required by the Commission."

QUESTIONS PRESENTED

1. May the Court of Appeals reverse the ruling of the District Judge dismissing for want of substantial evidence the affirmative defense of respondent where the evidence adduced in support of such defense is legally insufficient to sustain respondent's burden of proof?

2. Did the Court of Appeals, in reversing the ruling of the District Judge dismissing the affirmative defense, have the power also to direct entry of judgment for respondent on the issue of such defense instead of ordering a new trial where the evidence pertaining to this issue is subject to conflicting inferences and conclusions which may be drawn by reasonably minded men?

3. Did the Court of Appeals, in reversing the ruling of the District Judge dismissing the affirmative defense, have the power also to direct entry of judgment for respondent where, because of the ruling of the District Judge declared erroneous, there was no occasion in the trial of the case for the petitioner to controvert or dispute the facts of the respondent on the issue of the affirmative defense?

STATEMENT

Petitioner, James Earl Byrd, a resident of North Carolina, brought suit against respondent, Blue Ridge Rural Electric Cooperative, Inc., a South Carolina corporation engaged in the business of supplying and distributing electric power to consumers, to recover damages for negligence in causing and permitting electric current to run into a structure—a substation—in the process of construction on which petitioner was working, resulting in the loss of both forearms of petitioner, who at the time was 24 years of age, married, the father of two children and had an earning capacity of approximately $5,000.00 per year.

At the time of petitioner's injuries he was working as an employee of Bouligny Construction Company, Inc., of

Charlotte, North Carolina, an independent contracting construction firm, which, pursuant to a written contract with the respondent, was constructing a large project, including the substation involved herein, at a cost to respondent of $334,300.00 (Par. VI, Amended Answer; R. b., 60). Under this contract the substation, which during the process of construction was "under the charge and control of the Contractor" (Exhibit "C"; R. 27), was to be turned over to the respondent upon completion, and then only upon payment to the contractor of at least 90% of the contract price (Exhibit "C"; R. 28) at which time it was then to be used by respondent in the operation of its business of supplying and distributing electric power.

A short time prior to trial, respondent, pursuant to permission granted by the District Judge, amended its answer to include the affirmative defense that the work of constructing a substation being done by the independent contractor was part of respondent's business and hence the South Carolina Workmen's Compensation Act, Sections 72-111 and 72-121 (*supra*, page 2), was a complete bar to petitioner's action herein. (Paragraph VII—Amended Answer; R. c).

Respondent's affirmative defense that the work of constructing substations being performed by the independent building contractor was part of its business required proof (1) that such work otherwise is ordinarily and appropriately performed by the direct employees of respondent with its own facilities "in the promotion of its ordinary and usual business", and (2) that the subject matter of the work, to wit, the uncompleted structure (substation) being constructed by the independent contractor, was owned by respondent at the time of petitioner's injuries.

At the trial of this case, respondent sought to meet its first requirement of proof that its direct employees ordinarily and appropriately perform the work of constructing

substations in the promotion of its normal and usual business, solely by the testimony of its manager, A. J. Hurt, who, on depositions taken prior to trial, professed to have little, if any, knowledge concerning the manual work performed by respondent's employees or the nature of the work involved in the construction o. a substation (R. 13, 36, 40); he also stated on deposition that respondent, Blue Ridge, made no investigation of the occurrence resulting in petitioner's injuries because the substation did not belong to respondent and the injuries were not sustained by "one of our men" (R. 13, 14, 78, 79), an investigation which respondent would have been compelled to make in order to file the first report of injury required under Section 72-501, South Carolina Code, 1952, *supra*, page 3, if the Workmen's Compensation Act had been applicable herein.

Nevertheless, Mr. Hurt took the stand and testified on direct examination and part of cross examination that respondent built with its own employees and facilities three of its six substations (R. 31, 40, 75), the last of which, he stated, was built with its own employees at Liberty, South Carolina, three years prior to petitioner's injuries. (R. 38, 76). On the following day, however, when the witness Hurt was recalled to the stand for further cross examination and confronted with evidence that his testimony would be contradicted by undisputed facts, he recanted, changed and corrected his testimony given the previous day by stating that the respondent not only did not build with its own facilities and employees the substation at Liberty, South Carolina (R. 41, 42, 76), but also that it did not build with its own facilities and employees any of its six substations (R. 42, 77); and that Hurt had changed and corrected this material testimony was so understood by the trial judge (R. 50, 77). The testimony of Hurt viewed in its entirety was also equivocal and evasive (R. 15-18, 38, 39, 76, 77). The record was barren of other evidence that the

employees of respondent ordinarily and appropriately perform the work of constructing substations.

As to respondent's second requirement of proof, the record was devoid of any evidence that the subject matter of the work being performed by the independent contractor was owned by the respondent. On the contrary, it affirmatively showed that the respondent neither owned, possessed nor controlled the substation, the subject matter of the work being performed by the independent contractor at the time of petitioner's injuries. (Par: IV, Amended Answer; R. b. 10, 14, 19.)

At the conclusion of respondent's case and before petitioner's case in reply, petitioner, testing the legal sufficiency of respondent's evidence, moved to dismiss this defense (R. 48, 49, 73). The District Judge granted the motion (R. 52, 73) and, thereupon, there being no occasion to offer any reply evidence on the issue of the affirmative defense, the petitioner offered none and closed his case (R. 52, 73), following which respondent also closed its case.

At the close of the entire case, respondent moved for a directed verdict on the ground, *inter alia*, of its affirmative defense which had already been dismissed by the Trial Judge. This motion was denied (R. 54) and the case was submitted to the jury on the sole issues of negligence and contributory negligence.

The jury brought in a verdict of $126,786.80 in favor of petitioner. Upon consideration of respondent's motion for judgment n. o. v. or for a new trial made upon the ground of its affirmative defense, the District Judge denied same. Accordingly, judgment for the amount of the verdict was thereupon duly entered, from which the respondent appealed to the Court below.

On appeal, the Court below reached a factual finding, based upon the witness Hurt's testimony given prior to its repudiation, that respondent built three substations with

its own facilities and employees which the Court below held conclusively supported respondent's theory and defense that respondent was not only engaged in the business of supplying and distributing electricity, but also in the business of constructing substations, thus making the Workmen's Compensation Act applicable as a defense. The Court, therefore, reversed the District Court's judgment.

The Court below did not stop there, however. It determined that the testimony on this issue was uncontradicted, judged it as credible and concluded that respondent as a matter of law was in the business of constructing substations at the time of petitioner's injuries and hence the South Carolina Workmen's Compensation Act operated as a complete bar to petitioner's action herein. The Court below, therefore, remanded the case with direction to enter judgment for respondent without any discussion in its otherwise detailed opinion of the propriety of this direction. Petition for Rehearing was filed requesting, at the least, that the judgment be modified to direct a new trial (R. 72), but was denied by the Court below on November 15, 1956 (R. 82).

SUMMARY OF ARGUMENT

I

A. The reversal by the Court below of the District Court's dismissal of the affirmative defense is in direct conflict with the decision in *Galloway v. U. S.*, 319 U. S. 372, wherein this Court, at pages 379-380, in testing the legal sufficiency of evidence necessary to sustain a party's burden of proof, applied the standard of refusing to give legal efficacy or probative value to testimony of a witness who corrects, changes, recants and repudiates such testimony on the witness stand. This standard of testing the legal sufficiency of evidence is applied also by the South Carolina

Supreme Court, *Critzer v. Kerlin*, ... S. C. ....., 98 S. E. (2d) 761, 762-763; *McDowell v. Stilley Plywood Co.*, 210 S. C. 173, 41 S. E. (2d) 872, 874-875.

In applying this standard in the *Galloway case*, at page 395, this Court very clearly enunicated the applicable principle that "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked".

B. Judged by the foregoing standard and the corollary principle applied in *Galloway v. U. S.*, *supra*, it is clear that respondent's affirmative defense was not supported by substantial evidence.

The Court below in reversing, contrary to the applicable standard of both this Court and the South Carolina Supreme Court in testing the legal sufficiency of evidence, applied the standard of segregating a portion of the testimony of a witness from the whole of his testimony and giving probative value to such portion despite the fact that it was corrected, changed, recanted and repudiated by the rest of the testimony of such witness. Succinctly stated, it gave probative value to self-repudiated, as distinguished from self-contradictory, testimony of a witness.

Respondent's affirmative defense that the work of constructing substations being performed by the independent contractor was part of respondent's business and hence the Workmen's Compensation Act operated as a complete bar to petitioner's action required, in accordance with both the general and South Carolina law, proof that (1) such work is "ordinarily and appropriately" performed by the "direct employees" of respondent with its own facilities "in the promotion of its ordinary and usual business", *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33, *Sears Roebuck v. Wallace* (C. A. 4), 172 F. (2d) 802, 809-810; *Shafer v. Southwestern Bell Tel.*

Co. (Mo.), 295 S. W. (2d) 109, and (2) the subject matter of the work performed by the independent contractor, that is, the substation being constructed by the independent contractor, was owned by the respondent at the time of petitioner's injuries, *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26, 32.

Respondent, recognizing its first requirement of proof, sought to establish that its direct employees ordinarily and appropriately perform the work of constructing substations; however, as to its second requirement of proof, the record is not only barren of evidence that the substation, the subject matter of the work, was owned by the respondent at the time of petitioner's injuries, but it affirmatively shows that the substation was neither owned, possessed nor controlled by the respondent at such time.

The only testimony tending to support the respondent's burden of proof that its direct employees ordinarily and appropriately perform the work of constructing substations with its own facilities was given by the witness, respondent's manager A. J. Hurt. He testified on direct examination that respondent constructed three substations with its own employees and facilities, but as pointed out in the Statement, *supra*, this testimony was changed, corrected, recanted and repudiated by the witness, and thus, in accordance with the applicable standard of this Court in testing the legal sufficiency of evidence, lost its probative value.

The record is void of any other evidence that respondent's direct employees ordinarily and appropriately perform or have ever performed the work of constructing substations. On the contrary, according to respondent's witness Edward Vincent McMahon, the direct employees of the respondent ordinarily and appropriately perform the every day, recurrent work of stringing wires from the existing lines of respondent's company to the homes of new con-

sumers in order to make service connections and also perform the recurrent work of maintaining equipment in substations already in operation, as distinguished from constructing substations to be used by respondent upon completion. Also, the construction contract between respondent and the independent contractor, introduced in evidence by respondent, instead of supporting respondent's theory, proves the contrary; it calls for all of the work, including the construction of the substations, to be performed not with the facilities and by the direct employees of respondent but with the facilities and by the employees of the independent building contractor, which under the specific terms of the contract, was in "charge and control" of the work. In fact, it is undisputed that respondent "had nothing to do with the substation" until completion except its duty to exercise due care for the safety of persons working in the vicinity of its existing lines. And in attempting to exercise this duty, respondent assigned one of its employees, Ira Moss, to de-energize certain lines each day in the morning before commencement of work by the independent contractor and to re-energize such lines at the close of day. It was the negligence of this employee in causing current to run into a newly constructed line leading from the substation that caused petitioner's injuries.

Respondent, in support of its claim, placed some reliance upon the statute under which it was organized by which it was empowered to construct substations. But the evidence is clear that respondent's direct employees ordinarily and appropriately do not and have never performed such work either occasionally or in the usual course of respondent's business. And in the absence of such evidence, it is manifest that the statute alone is not sufficient to support respondent's affirmative defense. *Vermillion v. Woman's College of Due West*, 104 S. C. 197; 88 S. E. 649; *White v. Central Dispensary*, 99 F. (2d) 355. To hold otherwise would require

a construction of the pertinent provisions of the Workmen's Compensation Act far different than its plain wording, a construction that would extend the liability of "owners" to work which they are **empowered** to perform, instead of limiting their liability, as the provision unequivocally states, to work which **is** part of the owners' trade or business, and would render them liable for the payment of compensation benefits to employees of independent contractors under all circumstances, save the exceptional one where the contract with the independent contractor would be *ultra vires* as to corporations and illegal or prohibited by law as to individuals.

Thus, the Court below, in reaching its crucial factual finding that respondent's company constructed three substations with its own facilities and direct employees, ignored and disregarded the applicable standard of both this Court and the South Carolina Supreme Court in testing the sufficiency of one's evidence; instead, in direct violation of such standard and contrary to the teaching of *Galloway v. U. S., supra*, it viewed testimony out of context and applied the standard of giving probative value and legal efficacy to the self-corrected and self-repudiated testimony of a witness for a party having the burden of proof.

And in the absence of the required proof that respondent owned the substation, which was the subject matter of the work of the independent contractor at the time of the petitioner's injuries, the reversal by the Court below was contrary to applicable state law and in direct violation of the principle enunciated by this Court in *Galloway v. U. S., supra*, that "the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring" respondent's affirmative defense.

If respondent's employees ordinarily and appropriately performed the work of constructing substations with its

own facilities, respondent company records would have reflected such activities and could have been produced. Evidence of such crucial facts would have also been within the peculiar knowledge and possession of the employees of respondent who allegedly construct or have constructed its substations, including its "construction superintendent", Mr. Porter (R. 44). Respondent deliberately chose to withhold or not to produce its records nor present as witnesses its "Construction superintendent" or any of its employees who were in a position to supply the gap of crucial proof. Instead, it chose to rely upon judicial laxity which is not permitted to "bridge the canyon", *Galloway v. U. S., supra;* and particularly applicable is the language of Mr. Justice Rutledge wherein he states, "such practice does not require that * * * the jury be permitted to make inferences from the withholding of crucial facts, favorable in their effects to the party who has evidence of them in his peculiar knowledge and possession, but elects to keep it so". Consequently, the trial judge was not only authorized, but was under a duty, to dismiss respondent's affirmative defense.

C. Moreover, the decision of the Court below, in reversing the ruling of the District Judge dismissing the affirmative defense, was contrary to the South Carolina law. The common law remedy of an employee of an independent contractor against an "owner" is barred by the provisions of the South Carolina Workmen's Compensation Act only if the "owner" is liable for compensation benefits to the injured employee. But under the provisions of the Act involved herein, as pointed out in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26, 32, to render an "owner" liable for compensation benefits, it is prerequisite that the subject matter of the work be owned by the "owner". It is clear, however, from the record that the substation was neither owned, possessed nor controlled by respondent at the time of petitioner's injuries. In fact, until

completion and acceptance, respondent "wasn't supposed to have anything to do with that substation".

Also, where the work of an independent contractor involves the construction of a facility to be turned over to and used by the owner upon completion, as distinguished from the recurrent and periodic work of maintaining a facility in operation, such work is not the "trade, business or occupation" of the "owner" within the meaning of the Workmen's Compensation Act, so as to render him liable for compensation benefits. *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26, 33; *Sears Roebuck & Co. v. Wallace* (C. A. 4), 172 F. (2d) 802, 809; 150 A. L. R. 1210, 1226. Compare *Tucker v. Texas Oil Co.* (C. A. 5), 203 F. (2d) 918.

Additionally, assuming for the sake of argument that the work of the independent contractor in constructing substations may be part of the respondent's business, the dismissal of the affirmative defense herein is nevertheless supported by the reasoning in the South Carolina case of *Ballard v. Southern Cotton Oil Co.*, 145 F. Supp. 882; a case factually similar to the case *sub judice*, decided after the trial of the instant case. There, the District Judge of the Eastern District of South Carolina held that a person referred to as an "owner" secondarily liable under the Act who, because of coverage provided for by the independent contractor primarily liable, does not come within the Act to bear its liability, is not entitled "to be accorded its immunities". And, so likewise in the instant case, since the respondent did not come within the Act to bear its liability, it should not now be permitted to claim its immunities.

For the foregoing reasons it is respectfully submitted that the reversal by the Court below of the District Court's dismissal of the affirmative defense was erroneous.

II

A. Assuming, *arguendo*, that the evidence in support of respondent's affirmative defense was legally sufficient, the decision of the Court below in remanding with direction to enter judgment for respondent on its affirmative defense was contrary to the applicable decisions of this Court. It is firmly established that it would be an undue invasion of the jury's historic function for an appellate court to judge the credibility of witnesses and weigh the conflicting inferences and conclusions that may be drawn from the evidence. *Wilkerson v. McCarthy*, 336 U. S. 53; *Lavender v. Kurn*, 327 U. S. 645.

It is also well settled that the testimony of a witness, even if not contradicted by adverse testimony of other witnesses, raises an issue of credibility for a jury to determine where the witness has an interest in the outcome of the case, *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, his testimony is self-contradictory, evasive, equivocal, clouded with uncertainties and generalities, or his manner of testifying gives rise to doubts of his sincerity, *Quock Ting v. U. S.*, 140 U. S. 417, 20 Am. Jur. page 1030, Section 1180 *et seq.*

B. The Court below relied upon the testimony of respondent's manager A. J. Hurt that respondent constructed substations with its own employees and facilities, despite his subsequent retraction and change of testimony, as conclusive that respondent was engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to petitioner's action herein.

Reference to the record manifests, however, that the credibility of the witness Hurt became an issue determinable by a jury; also, that respondent was not in the business of constructing substations at the time of petitioner's in-

juries, if indeed it was ever in such business, in view of Hurt's testimony that respondent had not constructed any of its substations with its own facilities and employees. At the least, the evidence was subject to conflicting inferences and conclusions. Thus, the action of the Court below constituted an invasion of the province of the jury.

The evidence of record shows (1) that respondent had six substations (R. 40, 76); (2) that on direct and cross examination respondent company's manager, A. J. Hurt, testified that three of the substations were constructed with respondent's own facilities and employees, the last of which was constructed at Liberty, South Carolina, three years prior to petitioner's injuries (R. 31, 38, 75, 76); (3) that on being recalled to the stand for further cross examination the following day, Mr. Hurt stated that respondent did not use its own facilities and employees to construct its substation at Liberty, South Carolina, built three years prior to petitioner's injuries, but that the work was done by an independent contracting construction firm engaged in the business of constructing substations (R. 42, 76, 77); (4) that Mr. Hurt finally testified that respondent did not use its facilities or employees to build any of its six substations (R. 42, 77); (5) that Mr. Hurt's testimony was equivocal and evasive (R. 15-18, 38, 39, 76, 77); (6) that he refused to answer a material question propounded by petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might subject the witness to contempt of court (R. 15-18); and (7) that Mr. Hurt's testimony on depositions taken before trial was in direct conflict with the knowledge he professed to have about material facts to which he testified at the trial (R. 13, 36, 40).

Thus, ever assuming that respondent's evidence was legally sufficient, the action of the Court below in directing entry of judgment for respondent was clearly erroneous.

III

It appears from the record that respondent's affirmative defense was dismissed before petitioner's case in reply. Therefore, there was no occasion for petitioner to present reply testimony, and, accordingly, none was presented. Under such circumstances, the action of the Court below was in direct conflict with the decisions of this Court in *Weade v. Dickmann, Wright & Pugh*, 337 U. S. 801; *Fountain v. Wilson*, 336 U. S. 681; and *Kuku Nagano v. McGrath*, 342 U. S. 916, in which it was held that it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits by directing judgment against him when such party had no occasion to dispute or controvert the material facts because of the ruling of the District Judge declared erroneous.

The true effect of the holding of the Court below would be to deprive a party of the opportunity to present controverting evidence and the right to a jury trial at the risk of successfully challenging the legal sufficiency of the opponent's case in the trial court. It would, contrary to the spirit of the Federal Rules of Civil Procedure, discourage mid-trial attacks and consequently add to the time and expense of the orderly administration of justice. Moreover, it would be violative of the 7th Amendment to the U. S. Constitution which is impartial in its guarantee of both the right of trial by jury and the right to challenge the legal sufficiency of an opponent's case.

The decision of the Court below is not an "appropriate" judgment which was "just" under the circumstances and therefore not authorized by 28 U. S. C. 2106, *Bryan v. U. S.*, 338 U. S. 552.

ARGUMENT

I

An affirmative defense should be dismissed for want of substantial evidence where a defendant has the opportunity and occasion to produce evidence in support of such defense, but the evidence produced thereon is such that, in accordance with the standard and principles applicable in testing the legal sufficiency of one's evidence, a finding cannot properly be made for the defendant upon whom the onus of proof is imposed.

The Court below undertook to reverse the ruling of the District Court dismissing for want of substantial evidence the affirmative defense of respondent, under the assumption that the respondent constructs substations with its own employees and facilities and therefore is engaged in the business of constructing substations.

Petitioner challenges both the right and assumption of the Court below. He submits that not only was the action of the Court below inconsistent with applicable federal law that an affirmative defense which is not supported by substantial evidence should be dismissed but also that there was no evidence of record upon which the affirmative defense could be supported. Petitioner also submits that the reversal by the Court below was in conflict with the applicable State law.

A. **The Court below was without power or right to reverse the dismissal of the affirmative defense which according to applicable standards and principles was not supported by substantial evidence of record.**

It has long been the established rule in the federal courts that "before evidence may be left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party

producing it, upon whom the onus of proof is imposed." "A mere scintilla of evidence is not enough to require the submission of an issue to the jury."

Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780;
Gunning v. Cooley, 281 U. S. 90, 94;
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333;
Brady v. Southern R. Co., 320 U. S. 476, 479.

Directly on point herein is the standard applicable in testing the legal sufficiency of evidence that the testimony of a witness for a party having the affirmative of proof should be considered as a whole, and when so considered, neither probative value nor legal efficacy should be given to the testimony of the witness which is corrected, changed, recanted and repudiated by the witness on the stand.

Galloway v. U. S., 319 U. S. 372, 379-380;
Critzer v. Kerlin, ... S. C. ..., 98 S. E. (2d) 761, 762-763;
McDowell v. Stilley Plywood Co., 210 S. C. 173, 41 S. E. (2d) 872, 874-875.

The application of this standard promotes the administration of justice. To apply a different standard would encourage litigants to give false testimony in order to avoid dismissals and directed verdicts against them and at the same time would permit such litigants to purge themselves of the offense and avoid punishment therefor by changing, correcting and recanting such testimony on the witness stand.

A corollary of the application of this standard is the well established principle that "there is an essential requirement that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked". And where a party having the burden of proving the affirmative of an issue has the occasion

and the opportunity to produce evidence thereon, but the evidence produced is legally insufficient to support his burden of proof, such issue should be withdrawn from the case.

Galloway v. U. S., 319 U. S. 372, 395.

B. There was no substantial evidence in support of respondent's requirement of proof that respondent's direct employees ordinarily and appropriately perform the work of constructing substations to establish that it was in the business of constructing substations at the time of petitioner's injuries, if indeed it ever was in such business.

It is respectfully submitted that, on the basis of the record in this case, it was the duty of the District Judge to dismiss the affirmative defense.

Respondent's affirmative defense, that the work of constructing substations being performed by the independent contractor was part of respondent's business and hence the South Carolina Workmen's Compensation Act operated as a complete bar to petitioner's action, required for its establishment (1) proof that the work of constructing substations being performed by the independent contractor is work "ordinarily and appropriately" performed by the "direct employees" of respondent with its own facilities "in the promotion of its ordinary and usual business", *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33; *Sears Roebuck & Co. v. Wallace* (C. A. 4), 172 F. (2d) 802, 810; *Shafer v. Southwestern Bell Tel. Co.* (Mo.), 295 S. W. (2d) 109; and (2) proof, as pointed out in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 438, 48 S. E. (2d) 26, 32, that the subject matter of the work, that is, the uncompleted structure or substation being constructed by the independent contractor, was owned by respondent at the time of petitioner's injuries.

The record shows that respondent's first requirement of proof that its direct employees ordinarily and appropriately perform the work of constructing substations in

the promotion of its normal and usual business rested solely upon the self-repudiated and self-corrected, as distinguished from self-contradictory, testimony of respondent's manager that the respondent constructed three substations with its own employees; and as to its second requirement of proof the record was devoid of any evidence that respondent owned the subject matter of the work being performed by the independent contractor, that is, the uncompleted structure or substation which was being constructed by the independent contractor at the time of petitioner's injuries; to all of which we refer with more particularity below to demonstrate the lack of substantial evidence offered by respondent in support of its affirmative defense.

(1) **The testimony of respondent's manager, A. J. Hurt:** Respondent, recognizing its first requirement of proof, sought to establish that its direct employees ordinarily and appropriately perform the work of constructing substations solely by the testimony of its manager, A. J. Hurt, who on deposition prior to trial professed to have little, if any, knowledge concerning the manual work performed by employees of respondent's company or the nature of work involved in the construction of a substation; he also stated on deposition that respondent company did not make an investigation of the facts and circumstances surrounding petitioner's injuries because petitioner was not an employee of respondent (R. 13) and the substation was not owned by respondent at the time of petitioner's injuries (R. 14), an investigation that respondent would have been compelled to make if the Workmen's Compensation Act had been applicable.

Nevertheless, at the trial of the case, Mr. Hurt testified that respondent constructed with its direct employees and facilities three of its six substations, the last of which he stated was built with its direct employees three years prior to petitioner's injuries. Admittedly, this was strong testi-

mony tending to create a factual question on the issue of whether respondent's direct employees ordinarily and appropriately perform the work of constructing substations.

However, the following day when the witness Hurt was recalled to the stand for further cross examination, he changed, corrected, recanted and repudiated this testimony and thus destroyed all of its probative value by stating that the work of constructing the substation at Liberty, South Carolina, was not performed by the direct employees of respondent and finally admitting that respondent did not construct any of its six substations with its direct employees and own facilities (R. 42, 76, 77).

(2) **The testimony of Edward Vincent McMahon**: The only other testimony touching upon the work ordinarily and appropriately performed by the employees of respondent's company was given by respondent's witness, Edward Vincent McMahon, an employee of Southern Engineers, an electrical engineering firm of Georgia, engaged under a separate contract with respondent as an independent contractor to perform the engineering services and to inspect, test and approve the work of the independent building contractor to assure compliance with the plans and specifications.

This witness significantly enough did not testify that respondent's direct employees ordinarily and appropriately perform or have ever performed the work of constructing substations. On the contrary, he testified that they performed the construction work of stringing lines from respondent's existing system to homes of new consumers in order to make service connections (R. 45) and the everyday, recurrent work of maintaining the equipment in respondent's substations already in operation, such as "resetting breakers, reworking damaged equipment and/or supervising it and resetting existing regulators" (R. 45), and that respondent, "Blue Ridge Electric Cooperative also finds its

necessary at many times to 'heavy up', as we call it, their existing system in order to be able to carry additional power loads that they might develop on their system". (R. 45). He also testified that until the substation involved herein was completed, turned over to respondent and accepted by it, respondent "wasn't supposed to have anything to do with that substation" (R. 47).

(3) **Exhibit "C", the construction contract between respondent and Bouligny Construction Company, the independent building contractor:** This exhibit shows that a written contract was awarded to Bouligny Construction Company, Inc., pursuant to a bid submitted by Bouligny to the respondent, (Exhibit "C"; R. 23). This contract called for Bouligny Construction Company to construct "approximately 24.2 miles of new electric transmission and distribution lines, the reconversion, rephasing and rehabilitation of approximately 87.7 miles of existing lines and the construction of two substations and a breaker station" (R. 56), at a cost to the respondent of the sum of $334,300.00. The substations, which during the process of construction were "under the charge and control" of Bouligny Construction Company (Exhibit "C"; R. 27), were to be turned over to respondent upon completion, and then only upon payment of at least 90% of the contract price (Exhibit "C"; R. 28), at which time such substations were to be used by respondent in the operation of its business of supplying and distributing electric power. The project, including the substation, during the course of construction until completion, was "under the charge and control of the contractor" (Exhibit "C"; R. 27) subject to inspection, tests and approval by another independent contractor, an electrical engineering firm, to assure compliance with the plans and specifications; until then respondent had nothing to do with it (R. 10, 14, 47), except its duty to exercise due care toward employees of the independent contractor working in the vicinity of

its existing lines by assigning one of its employees, Ira Moss, to de-energize such existing lines each day prior to the commencement of the construction work and to re-energize such lines at the close of the day.

It is thus clear that respondent's direct employees performed no construction work under the contract. Bouligny Construction Company was employed as an independent contractor to construct the project, which because of its magnitude and because respondent was not capable of handling the building of same as part of its normal and usual business, could not and would not ordinarily and appropriately be constructed or built by respondent's own employees in the usual course or as a part of respondent's business. In fact, the construction work of a project of this magnitude, if attempted to be performed by the employees of respondent as part of its normal and usual business would interrupt, interfere and hinder rather than promote the operation of respondent's usual business. It is work which could be performed only by an independent contracting construction firm set up with the proper facilities and trained employees to perform such work, as was done in the case *sub judice*.

(4) **The Statute under which respondent company was organized:** Some reference was made by respondent, in support of its claim, to the Statute under which respondent was organized which confers upon it the power to construct substations.

It is clear, however, that a Statute relative to powers conferred upon corporations does not, in the absence of evidence as to the exercise of such powers and the actual operations of a corporation organized under such Statute, furnish proof that such corporation ordinarily and appropriately exercises any of such powers through its direct employees in the prosecution of such business. *Vermillion v. Woman's College of Due West*, 104 S. C. 197, 88 S. E.

649; *White v. Central Dispensary*, 99 F. (2d) 355. The logic of this reasoning becomes even more apparent when we consider that the fact that an individual has the legal right or power, with certain exceptions, to engage in many different businesses and perform many types of work is not proof that such individual is in each or any of such businesses, or that each or any type of such work is part of his business, in the absence of evidence as to his actual operations showing the particular work or business in which he is engaged. Similarly, the mere fact that a corporation is empowered to engage in a particular work or business does not prove that it is actually engaged in such work or business.

Under respondent's reasoning, the provisions of the South Carolina Workmen's Compensation Act involved herein, Section 72-111, would have to be construed as extending the liability of "owners" for the payment of compensation benefits to work which individual and corporate "owners" have a right or are empowered to perform, rather than limiting their liability, as the section involved herein unequivocably states, to employees of contractors performing work "which is part of" such corporation's or individual's "trade, business or occupation". The quoted language of the Statute when used in "this ordinary sense and acceptation" connotes work which ordinarily and appropriately would be performed with some degree of constancy, frequency or regularity by the direct employees of the principal employer. *Benbow v. Edmunds High School*, 220 S. C. 363, 371, 372, 67 S. E. (2d) 680, 683, 684.

Such a construction of the provision of the Act involved herein is not only unwarranted, but there is no logical basis for it. The chief purpose of this provision is "to prevent employers from relieving themselves from liability by doing through independent contractors what they would otherwise do through direct employees." *Benbow v. Edmunds*

High School, 220 S. C. 363, 372; 67 S. E. (2d) 680, 684; *Marchbanks v. Duke Power Company*, 190 S. C. 336, 342, 2 S. E. (2d) 827; *Sears Roebuck v. Wallace* (C. A.), 172 F. (2d) 802, 810. It is not the purpose of this provision of the Act to make the employer liable for compensation benefits to employees of independent contractors for injuries sustained in performing the work of building a structure—a facility which upon completion may be necessary in the operation of a business; work which the principal employer is empowered to have performed by independent contractors, as distinguished from work which is ordinarily and appropriately performed by "direct employees" of an owner "in the promotion of his ordinary and usual business". *Sears Roebuck v. Wallace*, 172 F. (2d) 802, 809; *Miles v. W. Va. Pulp & Paper Co.*, 212 S. C. 424, 48 S. C. (2d) 26.

From the foregoing review of the record it is manifest that, with the exception of Mr. Hurt's testimony which was corrected and repudiated by him, the record is barren of evidence that respondent's direct employees ordinarily and appropriately perform the work of constructing substations.

Consequently, the crucial factual finding of the Court below that respondent constructed three substations with its own facilities and employees, and hence respondent had met its first requirement of proof, rested solely upon Hurt's testimony taken out of context. In reaching this finding the Court below did not follow the applicable standard of both this Court and the South Carolina Supreme Court in testing the legal sufficiency of evidence; instead, in disregard and in direct violation of such standard, it gave probative value and legal efficacy to testimony of respondent's manager, A. J. Hurt, who changed, corrected, recanted and repudiated such testimony on the witness stand prior to the completion of his examination.

If respondent's employees ordinarily and appropriately construct or have constructed substations, knowledge of such activities was within the peculiar possession of respondent through its company records reflecting its activities. Evidence of such crucial facts was also within the peculiar knowledge and possession of respondent's own employees who allegedly construct or have constructed substations. It was respondent's burden under its affirmative defense to show that its direct employees ordinarily and appropriately construct substations. Respondent, however, deliberately chose, for reasons best known to itself, to withhold or not to produce its records nor present the testimony of such employees who were in a position to best supply the gap of crucial proof, which judicial laxity is not permitted to bridge. *Galloway v. U. S.*, 319 U. S. 372, 386, 387. The instant case, therefore, is controlled by *Galloway v. U. S., supra,* in which this Court held that a party having the onus of proof does not establish his case where he has within his peculiar knowledge and possession evidence of crucial facts which he fails to produce but relies instead upon inferences to be drawn by a jury from the withholding of such evidence. As stated in the opinion by Mr. Justice Rutledge, such practice "does not require that * * * the jury be permitted to make inferences from the withholding of crucial facts, favorable in their effects to the party who has the evidence of them in his peculiar knowledge and possession, but elects to keep it so."

We are not unmindful of the language of Mr. Justice Murphy in *Lavender v. Kurn*, 327 U. S. 645, that a measure of speculation and conjecture is required on the part of the jury in practically every case, but only under circumstances "whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences". None of such circumstances is present in the instant case. Here the evidence in support of respondent's affirma-

tive defense was much weaker and clearly did not rise to the dignity of the evidence which this Court held legally insufficient to support the onus of proof imposed upon the party producing the evidence in the *Galloway case*. Thus, it became the duty of the District Judge in accordance with applicable federal law to dismiss respondent's affirmative defense.

C. The record is void of the evidence required by South Carolina law to render applicable the Workmen's Compensation Act as a defense.

The record is void of any evidence to support respondent's second requirement of proof that the substation, the subject matter of the work being performed by the independent contractor, was owned by respondent at the time of petitioner's injuries. In fact, it conclusively appears from the pleadings (Par. IV, Amended Answer; R. b), respondent's answers to interrogatories (R. 18-20), and the other evidence of record (R. 14, 42, 47), that the substation under construction on which petitioner lost both forearms was neither owned, controlled nor possessed by respondent at the time of petitioner's injuries and that respondent had no interest or concern in the work performed by petitioner on the substation during the course of its construction (R. 13). Therefore, the reversal by the Court below was in direct conflict with the principle enunciated by the Court in *Galloway v. U. S., supra.*

Under applicable South Carolina law, as pointed out in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 437, 48 S. E. (2d) 26, 32, in order to render an "owner" liable for payment of compensation benefits to an injured employee of an independent contractor it is a necessary prerequisite that the subject matter of the work performed by the independent contractor be **owned** by the "owner". The South Carolina Supreme Court made it clear in the cited case that in other South Carolina cases where persons re-

ferred to as "owners" were held liable for compensation benefits to injured employees of independent contractors, the subject matter of the work being performed by the independent contractor was **owned** by the "owner", and the Court was careful to point out this distinguishing feature in rejecting the application of the Act to the facts in the cited case, as follows:

> "In all three cases just cited, the timber cut and transported to the employer's manufacturing plants **was the property of the employer,** which is in significant contrast to the facts in this case. Here there was **no ownership** by the defendant of the timber or the harvested pulpwood prior to the delivery of the latter to the railroad company for transportation to the defendant." (Emphasis added.)

So, likewise, as appears from the opinion of the Court below in the instant case, "On the day of the accident the Walhalla substation was nearly finished but it had not been turned over to the owner and was not scheduled to be energized for another thirty days" (R. 57).

The Court below, in reversing, relied upon the South Carolina cases of *Marchbanks v. Duke Power Company*, 190 S. C. 336, 2 S. E. (2d) 825 and *Boseman v. Pacific Mills*, 193 S. C. 479, 8 S. E. (2d) 878, in both of which the facts are distinguishable from those in the instant case, and therefore not controlling herein. In each of the cited cases it is clear that (1) the contractor was engaged to perform **maintenance** work required to be performed periodically and recurrently in order to carry on and continue the business of the owner, no matter how large, small, static or progressive such business might be, and (2) that such work was performed on a facility **owned** by the defendant. Such facts are in significant contrast to the facts herein that the work being performed by the independent contractor at the time of petitioner's injuries was the non-periodic and non-recurrent work of constructing a new facility to be turned

over to the respondent upon completion and that the subject matter of the work was not owned by respondent at the time of petitioner's injuries. Compare *Tucker v. Texas Oil Co.* (C. A. 5), 203 F. (2d) 918, 923, 924. Such work of constructing a facility to be turned over to and used by an owner upon completion in the operation of his business, in accordance with the reasoning of the South Carolina Supreme Court in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33, and the decisions of the majority of other jurisdictions as indicated in the annotation contained in 150 A. L. R. 1210, 1226, does not constitute the "trade, business or occupation of the owner".

Particularly applicable to the work involved herein is the reasoning of Mr. Justice Stukes, now Chief Justice of the South Carolina Supreme Court, in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33, quoting with approval from the language of the Georgia Court of Appeals in *Huiet, Commissioner v. Brunswick Pulp & Paper Co.*, 74 Ga. App. 355, 39 S. E. (2d) 545, as follows:

> "The mere fact that a commodity is essential and necessary in the operation of a business **does not mean that the supplying of it is part of the business.** It may be admitted that pulpwood is a commodity essential to the operation of the defendant's business, but it does not necessarily follow that **the work of supplying the mill with pulpwood is part of the usual business operated by the defendant.**" (Emphasis supplied.)

Applying the reasoning of the foregoing quotation, it is respectfully submitted that the mere fact that a substation is a facility which upon completion may be essential and necessary in the operation of respondent's business does not mean that the work of constructing such substation is part of the respondent's business. The reasoning of the South Carolina Supreme Court in the *Miles case* applies with equal force to the facts in the instant case. Compare

Glidden Rural Electric Cooperative v. Iowa Employment Security Commission (Iowa), 20 N. W. (2d) 435, where the Court held that work of an independent contractor in constructing lines was not part of the business of the cooperative.

The ruling of the Chief Judge of the District Court for the Western District of South Carolina, Honorable C. C. Wyche, involved a question of local substantive law of South Carolina. His ruling was in accord with correct principles of law and in consonance with the reasoning of the South Carolina Supreme Court in *Miles v. West Va. Pulp & Paper Co.*, 212 S. C. 424, 439, 48 S. E. (2d) 26, 33, wherein the Court cited with approval a Wisconsin case in which a lumber company that did not do its own logging was held not liable for compensation benefits to an injured employee of an independent contractor, a farmer, who was engaged to do the logging operations for the lumber company, upon the basis that the services of the independent contractor were not in "promotion of its ordinary and usual business such as would otherwise be performed directly through its employees * * *". The District Judge's ruling was also in accord with the philosophy announced in the decisions of the South Carolina Supreme Court and enunciated by the Court of Appeals for the Fourth Circuit in its prior case, *Sears Roebuck v. Wallace*, 172 F. (2d) 802, a case on which Judge Wyche sat as a member of the Court of Appeals. No reason was stated in the opinion of the Court below for not applying the controlling principles of the *Sears case* in which it was held that the work of making alterations by an independent contractor in a storage warehouse of the owner was not the business of the owner, except the brief passing remark that the *Sears case* was distinguishable from the instant case "on the ground that the work done, although useful to the business, was performed in carrying on a trade or occupation in which the owner of the business was not

engaged". It is clear, however, from a reading of both decisions and the record herein that the facts in the instant case are much stronger than those in the *Sears case* to warrant the exclusion of the Workmen's Compensation Act as a defense and that the decision of the Court below in the case at bar is in direct conflict and irreconcilable with the *Sears, case,* both on the law and the facts.

The Court below, not having among its members a South Carolina lawyer, in reversing the action of the Chief District Judge, contrary to the accepted and usual course of judicial review, did not give weight to the judgment of the District Judge on a question of local law of a state in which the District Judge was an outstanding and able lawyer of long experience who had served in the South Carolina legislature and had sat as an acting Associate Justice of the State Supreme Court. *Bernhardt v. Polygraphic Company of America,* 350 U. S. 198; *Standard Brands v. Bateman* (C. A. 8), 184 F. (2d) 1002, cert. den., 340 U. S. 942. Appellate courts should be slow to impute to trial courts a want of perspicacity in determining the local law, and, as stated in headnote 1 *Nordin v. May* (C. A. 8), 208 F. (2d) 131, "where question to be determined involved application of state law, which, at best, was at least uncertain on the subject, Court of Appeals on appeal would defer to judgment of Federal District Court concerning the state law."

Even assuming that the work of constructing substations was the business of respondent, the dismissal of respondent's affirmative defense is also supported by the opinion in *Ballard v. Southern Cotton Oil Co.* (S. C. 1956), 145 F. Supp. 882, a case factually similar to the instant case, which was decided subsequent to the trial of the case *sub judice* but before it reached the Court below on appeal. The *Ballard case* holds that an employee of an independent contractor may maintain a common law action against an

"owner" **secondarily** liable who does not come within the Act to bear its liabilities because of the coverage provided for under the Act by the independent contractor primarily liable. And that an "owner" under the Act involved herein, Section 72-111, is "secondarily" liable is clear from the language in *Younginer v. J. A. Jones Construction Company*, 215 S. C. 135, 143, 54 S. E. (2d) 545, 549, wherein the South Carolina Supreme Court stated:

> "The liability imposed upon the principal contractor by the terms of Section 7035-22 (now Section 72-111) is secondary in nature." (Emphasis and parenthesis supplied.)

The Court below, in rejecting the reasoning of the *Ballard case*, relied upon *Marchbanks v. Duke Power Co.*, 190 S. C. 336, 2 S. E. (2d) 825, the facts of which we submit are entirely distinguishable from, and not controlling upon, those in the instant case. In the *Marchbanks case*, the number of the employees working under the independent contractor was so small that he was not required to, nor did, carry compensation insurance, thus bringing the employer primarily liable under the Act, whereas in the instant case the independent contractor was financially responsible and carried compensation insurance, thus absolving the respondent from any liability for the payment of compensation benefits under the Act. On this point, the Court in the *Marchbanks case*, in discussing the reason for the enactment of the provision of the Act herein involved, stated at page 828 in the S. E. Reporter and at page 343 in the S. C. Reporter:

> "Doubtless in many instances such contractor would be financially irresponsible, or the number of employees under him would be so small, as in this case, that such contractor would not be required under the Act to carry compensation insurance. It was therefore provided under the first paragraph that when such work in which the employee was engaged was part of

the owner's trade or business, the owner would be responsible in compensation to all employees doing such work, whether employees of an independent contractor or not."

"The General Assembly evidently did not wish to extend the above rule to a case where such work was not part of the trade or business of the owner. To illustrate, if a merchant wished to construct an apartment house, the General Assembly did not desire to hold him responsible in compensation for injuries to employees of the contractor to whom the contract had been awarded for the construction of the apartment house."

For the foregoing reasons, it is respectfully submitted that the dismissal of respondent's affirmative defense by the District Court was eminently correct, and the reversal by the Court below of the District Court's ruling was clearly erroneous.

II

Where evidence in support of an affirmative defense, although legally sufficient, is subject to conflicting inferences which may be drawn by reasonably minded men and is dependent upon witnesses whose credibility is in issue, it is beyond the power of a federal appellate court to direct entry of judgment in favor of a defendant on the issue of such defense.

The Court below, in reversing, undertook to direct entry of judgment for respondent under the assumption that (1) the testimony of respondent's manager, A. J. Hurt, that respondent built with its own facilities three of its substations was uncontradicted; (2) Hurt's testimony was credible and therefore conclusive; and (3) the only inference or conclusion deducible from such testimony was that respondent was engaged in the business of constructing substations.

Petitioner challenges both the power and assumption of the Court below. He submits that the witness Hurt changed.

corrected, retracted and recanted the testimony upon which the Court below relied. And even if the evidence may be construed to be legally sufficient, the witness Hurt's testimony, although not contradicted by adverse testimony, was self-contradictory. Petitioner also submits that by reason of such self-contradictions, evasiveness of the witness, his interest in the case and his manner of testifying, the credibility of this witness was clearly put in issue which is for a jury to determine. It is also submitted by petitioner that even if the credibility of the witness Hurt were not in issue, and even if the record can be viewed as if there were testimony in the case that respondent constructed three substations with its own facilities, the last of which was constructed three years before petitioner's injuries, despite the subsequent change of Hurt's testimony concerning these facts, the conclusion is clear that respondent had abandoned such work three years prior to petitioner's injuries and was not engaged in the business of constructing substations at the time of the injuries. At the least, these circumstances presented for the determination of a jury the factual question of whether respondent at the time of petitioner's injuries was engaged in the business of constructing substations, if indeed it ever was engaged in such business, so as to invoke the basic defense of the South Carolina Workmen's Compensation Act.

A. **The Court below was without power to judge the credibility of witnesses and weigh conflicting inferences and conclusions that may be drawn from the evidence.**

That it would be an undue invasion of the jury's historic function for an appellate court to judge the credibility of witnesses and weigh conflicting inferences and conclusions that may be drawn from the evidence is an established rule of judicial review.

Wilkerson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;

Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620;
Tennant v. Peoria & Pekin Union R. Co., 321 U. U. 29.

It is also well settled that testimony of a witness, even if not contradicted by adverse testimony of other witnesses, raises an issue of credibility which is for a jury to determine where the witness has an interest in the outcome of the case, *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, his testimony is self-contradictory, evasive, equivocal, clouded with uncertainties and generalities, or his manner of testifying gives rise to doubts of his sincerity, *Quock Ting v. U. S.*, 140 U. S. 417, 20 Am. Jur., page 1030, Section 1180 *et seq.*

B. **The evidence of record pertaining to respondent's affirmative defense manifests that the action of the Court below in directing entry of judgment for respondent constituted an invasion of the province of the jury contrary to the 7th Amendment to the United States Constitution and was in conflict with the decisions of this Court.**

The Court below, in directing entry of judgment for respondent, contrary to established principles of law and invading the province of the jury, judged the credibility of the material witness, A. J. Hurt, and viewed the case in the light most favorable to the respondent; it relied upon the testimony of Mr. Hurt that respondent used its own facilities and employees to construct three of its substations, despite his subsequent change of testimony, and his inconsistent statements given on deposition, as conclusive that the respondent was engaged in the business of constructing substations so as to warrant the application of the South Carolina Workmen's Compensation Act as a bar to petitioner's action herein.

Viewing the testimony of Mr. Hurt as a whole, as it must be viewed on appeal, and not out of context as viewed

by the Court below, it becomes clear that his credibility became an issue determinable by a jury; and, even assuming that after Mr. Hurt completed his cross examination there was evidence remaining in the record that respondent had used its own facilities to construct substations, it is clear from the record that respondent at the time of petitioner's injury had abandoned such work; or, at the least, that the evidence was subject to conflicting inferences and conclusions on the question of whether respondent was engaged in the business of constructing substations at the time of petitioner's injuries.

The evidence of record as heretofore pointed out shows (1) that respondent had six substations; (2) that on direct and cross examination respondent company's manager, A. J. Hurt, testified that three of the substations were constructed with respondent's own facilities and employees, the last of which he stated was constructed with its own employees at Liberty, South Carolina, three years prior to petitioner's injuries; (3) that on being recalled to the stand for further cross examination the following day, Mr. Hurt stated that respondent did not use its own facilities and employees to construct its substation built at Liberty, South Carolina, three years prior to petitioner's injuries, but that the work was done by an independent contracting construction firm engaged in the business of constructing substations; (4) that Mr. Hurt finally testified that respondent did not use its facilities or employees to build any of its six substations; (5) that Mr. Hurt's testimony was evasive and equivocal; (6) that he refused to answer a material question propounded by petitioner's counsel and continued to give evasive answers until finally cautioned by the District Judge that refusal to directly answer the question might subject the witness to contempt of court; and (7) that Mr. Hurt's testimony on depositions taken before trial was in direct conflict with the knowledge he professed to

have about material facts to which he testified at the trial. Under the foregoing evidence, even if it can be held that the action of the District Judge dismissing the affirmative defense was erroneous, the credibility of the witness Hurt, the weight of his testimony and the conflicting inferences and conclusions that may be drawn from the evidence, are all questions which should be determined by a jury.

Therefore, assuming that the evidence in support of respondent's affirmative defense may be legally sufficient, it is respectfully submitted that the Court below, by substituting its view of the case for that which should be determinable by a jury, invaded the province of the jury, contrary to the rights of petitioner under the 7th Amendment to the Constitution of the United States.

III

Where, because of the ruling of a district judge declared erroneous by a federal appellate court, a plaintiff does not have the occasion to dispute or controvert the material facts of a defendant on the issue of an affirmative defense, it is beyond the power of the federal appellate court to deprive plaintiff of the right to controvert such material facts and have a trial on the merits by directing judgment against the plaintiff on the issue of the affirmative defense.

It is settled by the decisions of this Court that it is beyond the legitimate function of an appellate court, in reversing the ruling of a District Judge, to deprive a party of the right to controvert material facts and have a trial on the merits by directing judgment against him when such party had no occasion to dispute or controvert the material facts of the opposite party because of the ruling of the District Judge declared erroneous by the federal appellate court.

Weade v. Dickmann, Wright & Pugh, 337 U. S. 801;

Fountain v. Wilson, 336 U. S. 681;
Kaku Nagano v. McGrath, 342 U. S. 916.

In each case the question before this Court was whether the appellate court could order judgment for a successful appellant on an issue as to which the opposite party had no occasion in the trial court to produce evidence or controvert the material facts of the successful appellant.

The rationale of the foregoing cases applies with equal force to the instant case which presents the same important question. Petitioner's motion to dismiss the affirmative defense before his case in reply was based upon the particular legal theory that the evidence of respondent in support of its affirmative defense was legally insufficient to support a verdict for respondent on this defense and consequently did not warrant the presentation of any reply testimony by petitioner on the issue of such defense. This motion was granted, and, therefore, not only was there a lack of occasion to controvert respondent's testimony on this issue, but any further testimony on this point would have been superfluous and would have transgressed the ruling of the District Judge. The action of the District Judge in disposing of this issue at the first opportunity which in his opinion was appropriate and in accord with the rights of the parties was in consonance with the spirit of our federal procedural law as expressed in Rule 1 of the Federal Rules of Civil Procedure that there shall be a "just, speedy and inexpensive determination of every action".

The true effect of the holding of the Court below would be to deprive a party of the opportunity to present controverting evidence and the right to a jury trial at the risk of successfully challenging the legal sufficiency of his opponent's case in the trial court. It would thus tend to discourage, contrary to the spirit of the Federal Rules of Civil Procedure, mid-trial attacks on the legal sufficiency of an opponent's case and consequently add to the time and ex-

pense of the orderly administration of justice. Moreover, it would be violative of the 7th Amendment to the Constitution which was not framed nor adopted to deprive a party of either the right to a jury trial or of the right to challenge the legal sufficiency of the opponent's case. "The Amendment is impartial in the guaranty of both" *Galloway v. U. S.*, 319 U. S. 372, 393.

Also, the decision of the Court below directing entry of judgment for defendant is not an "appropriate" judgment which was "just" under the circumstances, and therefore not authorized by 28 U. S. C. 2106. *Bryan v. U. S.*, 338 U. S. 552.

It is therefore respectfully submitted that, in view of the fact that the petitioner had no occasion to dispute the material facts of respondent on the issue of its affirmative defense, in accordance with the applicable decisions of this Court, it was beyond the legitimate function of the Court below to direct entry of judgment for respondent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below reversing and remanding the judgment of the District Court with direction to enter judgment for respondent should be reversed and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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